

Filed August 30, 2012

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	Case No. 12-PM-16480
)	
ROBERT FRANK ZWIERLEIN,)	OPINION AND ORDER
)	
A Member of the State Bar, No. 138485.)	
_____)	

Finding that Robert Frank Zwierlein repeatedly violated the conditions of his probation, a hearing judge recommended that Zwierlein's probation should be revoked and he should be suspended for one year, subject to a new two-year probation period with additional conditions. The hearing judge also ordered Zwierlein's involuntary inactive enrollment.

Zwierlein seeks review. He does not dispute his probation violations, but maintains they were neither willful nor material. He also contends that a one-year suspension is excessive, asking that we reduce it to a suspension equal to and concurrent with the time he was on inactive status. The State Bar Office of Probation (Probation) maintains that a one-year suspension is appropriate.

We have independently reviewed the record (Cal. Rules of Court, rule 9.12), and we adopt the hearing judge's determination that Zwierlein's probation should be revoked due to his recurring violations. We further agree with the hearing judge that Zwierlein should be actually suspended for one year, with credit given for his inactive enrollment, and a new two-year period of probation should be imposed. The standards and comparable case law support our recommendation, which will provide Zwierlein with an opportunity to prove his ability to comply with his ethical responsibilities before returning to the practice of law.

I. FACTUAL AND PROCEDURAL BACKGROUND

The parties do not dispute the key facts underlying the hearing judge's findings, although Zwierlein argues that the evidence does not prove he willfully violated his probation.

Zwierlein was admitted to practice law in California on December 7, 1988. He has one prior record of discipline, which underlies this probation revocation proceeding. In his prior discipline, the parties stipulated that Zwierlein committed the following misconduct between July 2003 and October 2006 in two client matters: (1) Business and Professions Code, section 6068, subdivision (o)(3)¹ (failure to report sanctions); (2) section 6103 (failure to pay sanctions in violation of court order); (3) section 6068, subdivision (m) (failure to keep client informed of significant developments); and (4) rule 3-110(A) of the Rules of Professional Conduct (failure to act with competence). On October 13, 2010, the State Bar Court approved the stipulation and the recommended discipline of one year's stayed suspension and two years' probation. The California Supreme Court adopted the discipline recommendation, and on February 9, 2011, it ordered Zwierlein to comply, inter alia, with the following conditions of probation:

(a) Contact Probation within 30 days of the effective date of discipline and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation;

(b) Submit a written quarterly report to Probation on January 10, April 10, July 10, and October 10 of each year, stating under penalty of perjury that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period; and

(c) Provide satisfactory proof of attendance at a session of the State Bar Ethics School, and passage of the test given at the end of that session, to Probation within one year of the effective date of the discipline.

¹ All further references to sections are to this source.

The Supreme Court's order became effective on March 11, 2011, placing Zwierlein on probation from March 2011 to March 2013. On March 7, 2011, Probation wrote to Zwierlein, reminding him of the conditions of his probation. It enclosed copies of the Supreme Court's order, the probation conditions, instruction sheets and forms to use in submitting quarterly reports, and the State Bar Ethics School schedule of 2011 sessions.

II. ZWIERLEIN COMMITTED NUMEROUS PROBATION VIOLATIONS

The hearing judge below correctly found by a preponderance of the evidence² that Zwierlein willfully failed to comply with the terms of his probation.

A. Failure to Timely Arrange Meeting with Probation

The deadline for Zwierlein to schedule a meeting with his probation deputy was April 10, 2011. He did not do so. Instead, he waited until the next day, April 11, 2011, before telephoning Probation. Zwierlein's explanation for his tardiness is that he could not contact Probation on April 10th because it fell on a Sunday.

We agree with the hearing judge that Zwierlein's explanation does not justify his conduct. The Supreme Court order did not state that Zwierlein was to contact Probation *on* the 30th day after the discipline became effective. Rather, he was to communicate with Probation *within* 30 days after the effective date of his discipline. Zwierlein's conduct constituted a willful violation of this probation condition.

B. Failure to Timely Submit Quarterly Reports

Zwierlein failed to timely submit four quarterly reports. He agrees that his reports of October 10, 2011 and January 10, 2012, were each one day late because he sent them via Federal Express on the actual deadline dates. We find Zwierlein's failure to submit these two reports on

² Preponderance of the evidence is the evidentiary standard for probation revocation proceedings. (§ 6093, subd. (c).)

a timely basis was willful because he knew when he gave Federal Express the reports that they would be delivered after their due dates.

We do not agree with the hearing judge that Zwierlein's quarterly report due on April 10, 2012, was timely filed. Although Probation received the report on the due date, it did not accept it for filing because confusing markings rendered it defective. Probation did not abuse its authority in rejecting the defective report. More importantly, Zwierlein offered no evidence that he made any effort to remedy the defect once advised of the problem, even after Probation followed up with several phone calls, emails, and letters to assist him in complying with his reporting obligations. We find Zwierlein culpable of failing to file his April 10, 2012 quarterly report.

Zwierlein acknowledges that he failed to submit the July 10, 2012 report, but he blames the electronic calendar on his smart phone, which he replaced with a new one on July 5, 2012. According to Zwierlein, some of his data did not transfer properly, including the deadlines for his quarterly reports. Again, we agree with the hearing judge that Zwierlein's explanation does not justify his failure to satisfy this probation condition. His reliance *solely* on his cell phone to ensure his timely compliance with the Supreme Court's order does not excuse his probation violation.

C. Failure to Attend State Bar Ethics School

Zwierlein concedes that he failed to attend the State Bar Ethics School before the March 11, 2012 deadline imposed by the Supreme Court order. He completed the State Bar Ethics School on October 25, 2012, just prior to the hearing below. The hearing judge was particularly troubled by this probation violation, as are we. Zwierlein delayed attending the State Bar Ethics School for seven months past the court-ordered deadline, which is strong evidence of a lack of diligence and indifference to the importance of this probation requirement. Zwierlein's

only explanation is “lack of management of my calendar as I have been inundated with time consuming medical issues.” Zwierlein’s explanation is unavailing. As we discuss *post*, his medical conditions do not excuse his non-compliance. We thus adopt the hearing judge’s finding that Zwierlein willfully violated his probation condition to timely attend the State Bar Ethics School.

III. DISCUSSION

Section 6093, subdivision (b), authorizes the revocation of an attorney’s probation for violation of a probation condition. The hearing judge may recommend an actual suspension up to the entire period of stayed suspension. (Rules Proc. of State Bar, rule 5.312.) The extent of the recommended discipline is dependent on the seriousness of the probation violations. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.) Most importantly, the discipline recommendation should reflect the attorney’s recognition of his or her misconduct, as well as the efforts to comply with the conditions. (*Ibid.*)

Applying these criteria, we agree with the hearing judge that an actual suspension equal to Zwierlein’s entire stayed suspension is appropriate. Zwierlein does not dispute that he failed to timely satisfy several of his probation obligations. Instead, he argues that his failures were not willful due to a variety of excuses and rationalizations. However, “[w]ilfulness for purposes of probation revocation (and other disciplinary) proceedings is simply a general purpose or willingness to commit an act or to make an omission; it does not require any intent to violate . . . the probation condition and does not necessarily involve bad faith. [Citations.]” (*In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 309.) Zwierlein’s excuses were properly rejected by the hearing judge.

What is most troubling is Zwierlein’s seeming unwillingness to grasp the importance of *strict* compliance with his probation conditions, in spite of having been warned in writing by

Probation: “You are reminded that for all conditions, being **even one date late** [sic] means that you are **NOT** in compliance.” (Bold and underlining in original.) In addition, Probation specifically stated that if a reporting deadline landed on a weekend or a holiday, the report must be received before that weekend or holiday.

Without question, the filing of quarterly probation reports plays an important role in the rehabilitative process. “At a minimum, quarterly probation reporting is an important step towards an attorney probationer’s rehabilitation because it requires the attorney, four times a year, to review and reflect upon his professional conduct In addition, it requires the attorney to review his conduct to ensure that he complies with all of the conditions of his disciplinary probation.” (*In the Matter of Weiner* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763.)

Of equal importance is Zwierlein’s timely attendance at the State Bar Ethics School, which is an essential element of his probation. It provides the State Bar with a measure of assurance that he has reviewed and considered afresh his professional responsibilities. Zwierlein’s untimely meeting with his probation deputy, his tardiness in filing several of his quarterly reports, albeit at times by only a day or two, as well as his belated attendance at the Ethics School, constitute willful, repeated, and serious probation violations.

IV. AGGRAVATION AND MITIGATION

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)),³ while Zwierlein bears the same burden of proving mitigating circumstances. (Std. 1.2(e).) The hearing judge found three factors in aggravation and none in mitigation. We agree.

³ All further references to standards are to this source.

A. AGGRAVATION

1. Prior Record of Discipline: Standard 1.2(b)(i)

Zwierlein has one prior record of discipline, which we consider as serious aggravation because it involved a series of errors and omissions largely based on Zwierlein's failure to timely perform his professional responsibilities or comply with court orders. In one matter, his failure to provide responses to discovery and to attend a hearing on a motion to compel resulted in a dismissal of his client's case in 2005. He did not inform his clients of the dismissal. In a second client matter, his dilatory actions in prosecuting the client's appeal resulted in the appeal being twice dismissed (although later reinstated.) The Court of Appeal imposed a sanction of \$1,000, which he did not timely pay or report to the State Bar. The appellate court reported the sanction to the State Bar.

Zwierlein was disciplined for his repeated untimely performance on behalf of his clients and failure to perform court-imposed obligations, yet he continues to demonstrate an inattention to his professional responsibilities that mirrors his past misconduct. This repetition supports a recommendation of significant discipline. (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 528, 531 [greater degree of discipline warranted due to close nexus between previous misconduct and present probation violations].)

2. Multiple Acts of Misconduct: Standard 1.2(b)(ii)

Zwierlein committed multiple acts of misconduct in that he was late on several occasions in satisfying his probation conditions. We give this factor moderate weight.

3. Indifference: Standard 1.2(b)(v)

As noted *ante*, Zwierlein has demonstrated a lack of understanding of the importance of strict compliance with his probationary conditions. We consider this a most significant factor in aggravation. His pattern of indifference continues even in these proceedings, as Zwierlein was

late in filing his brief on appeal. Also, his check to pay for the costs of preparation of the transcripts was issued against insufficient funds.

B. MITIGATION

1. Medical Problems: Standard 1.2(e)(iv)

Zwierlein has had ongoing, serious medical problems since at least 2006, including diabetes, atrial fibrillation, hernia repair, serious infections, and peripheral neuropathy. However, the hearing judge was unwilling to afford Zwierlein any mitigation for his medical problems because he presented no testimony (neither his own nor that of a medical expert) to demonstrate a nexus between those problems and his misconduct or that the issues have been resolved. (Std. 1.2(e)(iv).) Zwierlein does not challenge the hearing judge's determination on appeal, and we find no basis in the record to reverse it.

V. LEVEL OF DISCIPLINE

“[T]here has been a wide range of discipline imposed for probation violations from merely extending probation . . . to a revocation of the full amount of the stayed suspension and imposition of that amount as an actual suspension.” (*In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 573.) The starting point for our discipline analysis is the standards. The Supreme Court has instructed us to follow the standards “whenever possible” (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and we give them great weight to promote “the consistent and uniform application of disciplinary measures.” (*In re Silvertown* (2005) 36 Cal.4th 81, 91, internal quotations and citation omitted.)

Standard 1.7(a) applies when there is a prior discipline and provides that the degree of discipline imposed in the present proceeding should be greater than that applied in the earlier matter. In Zwierlein's prior discipline, his entire suspension was stayed. Under standard 1.7(a), some period of actual suspension may be appropriate in this case. We also consider the length of

Zwierlein's previously stayed one-year suspension. (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 540 [total length of stayed suspension in prior matter to be considered when imposing discipline in present revocation case].) Finally, we consider the number and nature of the probation violations in the context of Zwierlein's prior misconduct. Here, the problems that resulted in the imposition of discipline in the first instance have persisted throughout Zwierlein's probation and this appeal. "[T]he greatest amount of discipline would be merited for violations which show a breach of a condition of probation significantly related to the misconduct for which probation was given." (*Ibid.*)

There are no mitigating factors but several serious aggravating factors. These circumstances raise "a serious concern about the need for public protection or [show] the probationer's failure to undertake rehabilitative steps." (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 540.) We accordingly adopt the hearing judge's recommendation that Zwierlein be actually suspended for one year, with the period of his inactive enrollment to be credited against the actual suspension, and that he be subject to a new two-year probationary period. This recommendation is fully supported by the range of discipline imposed in prior probation revocation cases. (*Potack v. State Bar* (1991) 54 Cal.3d 132 [two-year stayed suspension revoked and two-year actual suspension imposed for failing to timely file one probation report, pay restitution, and participate in revocation hearing]; *In the Matter of Luis* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 737 [three-year stayed suspension revoked and three-year actual suspension imposed for failing to submit two probation reports and attend Ethics School]; *In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 244 [two-year stayed suspension revoked and two-year actual suspension imposed plus compliance with standard 1.4(c)(ii) for submitting two incomplete probation reports].)

VI. RECOMMENDATION

We recommend that Robert Frank Zwierlein's probation be revoked and the previously ordered stay of suspension be lifted. We further recommend that Zwierlein be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for two years, with the following conditions:

1. Zwierlein must be suspended from the practice of law for the first year of the period of his probation, with his period of inactive enrollment credited against his actual suspension.
2. Zwierlein must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.
3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, Zwierlein must report such change in writing to the Membership Records Office and the State Bar Office of Probation.
4. Zwierlein must report, in writing, to the State Bar's Office of Probation no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which Zwierlein is on probation (reporting dates). However, if Zwierlein's probation begins less than 30 days before a reporting date, Zwierlein may submit the first report no later than the second reporting date after the beginning of his probation. In each report, Zwierlein must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:
 - (a) in the first report, whether Zwierlein has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and
 - (b) in each subsequent report, whether Zwierlein has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of his probation, Zwierlein must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, Zwierlein must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. Subject to the proper or good faith assertion of any applicable privilege, Zwierlein must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to him, whether orally or in writing, relating to whether Zwierlein is complying or has complied with the conditions of this probation.

6. Zwierlein's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if Zwierlein has complied with all conditions of probation, the two-year period of stayed suspension will be satisfied and that suspension will be terminated.

VII. RULE 9.20

We further recommend that Zwierlein be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

VIII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We do not recommend that Zwierlein be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners since he previously took the examination on November 5, 2011, and provided proof of his successful passage.

IX. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

X. ORDER OF INACTIVE ENROLLMENT

The hearing judge properly ordered that Zwierlein be involuntarily enrolled as an inactive member of the State Bar effective November 28, 2012, as required under section 6007, subdivision (d)(1). Zwierlein's inactive enrollment continues and will be terminated in the future in accordance with section 6007, subdivision (d)(2). Pursuant to section 6007, subdivision

(d)(3), we also recommend that Zwierlein receive credit for the period of time he will be inactively enrolled pursuant to that order.

EPSTEIN, J.

WE CONCUR:

REMKE, P. J.

PURCELL, J.